

83-1005

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ALEXANDER L. STEVAS.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLARD SPAULDING,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, FIRST
DISTRICT

JULIUS LUCIUS ECHELES
FREDERICK F. COHN
JOYCE A. MATUZAK
35 E. Wacker Drive
Chicago, Illinois 60601
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether due process was violated when the State reviewing court affirmed a conviction of involuntary manslaughter that requires proof of defendant's recklessness without finding there to exist any evidence of the defendant's recklessness, but instead upholding the conviction because the trial court could have found evidence of a homicide involving a higher degree of culpability, i.e., murder or involuntary manslaughter.

PARTIES INVOLVED (per Rule 21.1(b))

Petitioner, Willard Spaulding, was indicted and tried for murder and convicted of involuntary manslaughter. Petitioner was appellant in the State reviewing courts.

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Due process was violated when the State reviewing court affirmed a conviction of involuntary manslaughter that requires proof of defendant's recklessness without finding there to exist any evidence of the defendant's recklessness, but instead upholding the conviction because the trial court could have found evidence of a homicide involving a higher degree of culpability, i.e., murder or involuntary manslaughter.

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**PETITION FOR WRIT OF CERTIORARI TO THE
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DISTRICT**

Petitioner, Willard Spaulding
(hereafter, defendant) respectfully prays
that a Writ of Certiorari be issued to
the Appellate Court of Illinois, First
District, to review its decision
affirming his conviction.

Judgments and Opinions Below

The order of the Appellate Court of Illinois, First District, No. 81-1836, affirming the conviction, is not reported, but is set out as Appendix A, per Rule 21.1(k)(i).

Jurisdictional Statement

On May 19, 1983, the Appellate Court of Illinois, First Judicial District, delivered its opinion affirming defendant's conviction and sentence.

(App. A) His timely petition for leave to appeal was denied by the Supreme Court of Illinois on October 4, 1983. (App.

B) This petition to review the judgment of a state court of last resort in a criminal case is timely filed within 60 days thereafter. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) and Rule 20.1.

Constitutional Provisions and Statutes Involved

**The Fifth Amendment to the United
States Constitution provides:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**The Fourteenth Amendment to the United
States Constitution provides, in part:**

Section 1. ... (N) or shall any State deprive any person ... of liberty ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE**Nature of the Case**

Defendant was indicted on the offense of murder, and convicted of the offense of involuntary manslaughter--an offense requiring, as an element, the mental state of being "reckless". He was sentenced to a term of two (2) to six (6) years in the Illinois Department of Corrections. On appeal it was argued there was no evidence of defendant's being reckless.

The State Appellate Court affirmed, because in their opinion, the defendant could have been found guilty of murder. The State Supreme Court denied a petition for leave to appeal that asserted that the Appellate Court's opinion denied defendant due process.

STATEMENT OF FACTS**The State's Theory**

The State's theory was that defendant, Willard Spaulding, and one Richard Schmidt had an altercation about 6:30 p.m. in Woody's Tavern, (on the south side of Chicago), with one Peter Najera and James Warsa; that Schmidt held a knife to the throat of Warsa while Spaulding held a gun at Najera; that Schmidt and Spaulding forced Najera and Warsa outside, robbed, i.e., took money from them and then let them go; that moments thereafter a fight broke out in the street between Schmidt and Warsa; that Najera then returned with a shotgun, shot at Spaulding; that the police arrived and Najera was arrested and charged with assault.

Later that evening, James Warsa, Frank Tavitias (a cousin of Peter Najera) and the deceased, Benito Najera, entered

Woody's Tavern; they were there when Schmidt, Cletus Eller (the brother of Spaulding), and Spaulding entered. A fight started between Schmidt and Warsa. The fight expanded to involve Eller and Tavitas. While the four of them were fighting, Spaulding pulled out a gun and pointed it at Benito Najera. Benito then started to go towards Spaulding who still held the gun on him; that Frank Tavitas then turned and started to go towards Spaulding and the defendant turned from Benito Najera to Frank Tavitas; that the deceased, Benito Najera, then rushed the defendant, pushing at Spaulding with his hands upon Spaulding's chest; that defendant then pushed back and fired. Defendant then beat Frank Tavitas with the weapon and fled.

Defendant's Contention

It was the defendant's contention that on the afternoon in question, after working that day at his construction company, he went to Woody's Tavern where he saw some of the other people who worked for him. He left the tavern and went across the street to his house. While he was home, a fight broke out between Schmidt and Tom Pantaleone on one side and Peter Najera and Warsa on the other. After the altercation spilled out of the tavern, Peter Najera obtained a shotgun and shot at Tom Pantaleone, who then grabbed the shotgun and fought with Peter Najera up the stairway to the defendant's house. Defendant, hearing the noise, came down, took the gun away from Peter Najera, and after taking the gun upstairs, came out onto the street; the police arrived and arrested Peter Najera for assault.

No accusation was ever made to the police by Peter Najera that Spaulding or Schmidt had robbed him. Spaulding and Pantaleone went to the police station where a complaint was signed by Pantaleone against Peter Najera.

Spaulding then went to a restaurant where he was joined by Eller, Schmidt and Pantaleone. After Pantaleone went home, Eller, Schmidt and Spaulding returned to Woody's Tavern. Spaulding entered and went to the bar. As Schmidt and Eller entered the tavern, a fight ensued between Schmidt and Warsa who was already in the bar. Eller then became involved in the fight which now included Tavitas and one other. Eller had a cast on his right arm and hand and had a gun with him; when someone pulled at his belt to pull the gun out, Eller fought with the person for the gun, held the gun and shot Benito Najera.

Eller then ran, taking the gun with him; he jumped in his truck and drove to Hammond, Indiana, where he threw the gun in a sewer. He then walked up to police officers sitting in a police car, advised them that he had just killed a man in Chicago and that he was sorry and "wanted to be put away."

Eller gave a statement to the Hammond Police and later one of a similar nature to the Chicago Police ... that if anyone was responsible for the homicide of Benito Najera, it was Eller, and not Spaulding.

The Trial Court

The trial court rejected the State's contention that the evidence demonstrated that defendant shot intentionally. Instead, the court found defendant guilty of involuntary manslaughter on the theory that defendant's conduct had been reckless.

The trial court stated:

The Court based its decision on the strong evidence that I find from Frank Tavitass that when the defendant was in the tavern, he had the gun; that when Frank Tavitass walked toward the defendant, that the defendant turned and put the gun on Tavitass; and when Najara went toward the defendant, that the defendant turned with his gun and shot him. That his conduct was reckless in pointing a gun at the defendant -- or at the victim and that this reckless conduct caused him to use his weapon for what he thought might have been, perhaps, self-defense by pushing him away, pushing the victim away and then firing the shot. This is recklessness. (Tr. 766)

Raising the Federal Question Below

The due process issue here raised was presented to the Appellate Court by asserting that there was not any evidence of recklessness, and again to the Illinois Supreme Court in a Petition for Leave to Appeal that asserted that the Appellate Court's affirmance violated due process.

REASONS FOR GRANTING THE WRIT

Due process was violated when the State reviewing court affirmed a conviction of involuntary manslaughter that requires proof of defendant's recklessness without finding there to exist any evidence of the defendant's recklessness, but instead upholding the conviction because the trial court could have found evidence of a homicide involving a higher degree of culpability, i.e., murder or involuntary manslaughter.

A conviction can be sustained only where upon reviewing the evidence in the light most favorable to the prosecution, a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 304, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781; Pilon v. Bordenkircher, 444 U.S. 1, 62 L.Ed.2d 1. Therefore, where a defendant is convicted of an offense involving an unique mental state, such as recklessness, it is insufficient to

sustain the conviction that the trier of fact could have found a higher degree of culpability that does not involve the unique mental state of the convicted offense.

Here, the State reviewing court affirmed defendant's conviction of involuntary manslaughter which requires proof of recklessness¹ by holding that

1. Under the Illinois law, involuntary manslaughter has as an essential element that defendant acted recklessly. Chap. 38, Sec. 9-3 reads as follows:

Involuntary Manslaughter and Reckless Homicide. (a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle, in which case the person commits reckless homicide.

Chapter 38, Section 4-6 defines reckless as follows:

the trier of fact could have found that the defendant had a different, more culpable mental state.

At trial, defendant's evidence was that he did not shoot deceased.² The prosecution's evidence was that defendant shot deceased when deceased rushed defendant and defendant pushed back and fired. It was the prosecution's theory that defendant was guilty of murder or

A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

2. The trial court, having heard evidence that defendant's brother surrendered to the police, admitted being in a fight and having shot deceased, would not admit polygraph tests by defendant and his brother that demonstrated that it was defendant's brother and not defendant who shot deceased.

voluntary manslaughter.³ The trial court rejected both defendant's and the

3. Under Chap. 38, Sec. 9-2, one is guilty of voluntary manslaughter if one unreasonably acts in self-defense or acts under intense provocation. The statute reads:

Voluntary Manslaughter. (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

- (1) The individual killed, or
- (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

prosecution's position, and held defendant guilty of involuntary manslaughter on the basis that defendant acted recklessly. The court stated:

The Court based its decision on the strong evidence that I find from Frank Tavitas that when the defendant was in the tavern, he had the gun; that when Frank Tavitas walked toward the defendant, that the defendant turned and put the gun on Tavitas; and when Najara went toward the defendant, that the defendant turned with the gun and shot him. That his conduct was reckless in pointing a gun at the defendant -- or at the victim and that this reckless conduct caused his weapon for what he thought might have been, perhaps, self-defense by pushing him away, pushing the victim away and then firing the shot. This is recklessness. (Tr. 766)

On appeal, defendant argued that the testimony accepted by the trial court as true, that of Frank Tavitas, does not demonstrate reckless conduct and hence, there is no evidence of the essential

element necessary for a voluntary manslaughter conviction.

The Appellate Court's response⁴ is legal "gobbledygook" that if given a semblance of sense, means the judge could have found defendant guilty of acting

4. The Appellate Court stated:

We reject this argument. The evidence showed that there was a conflict in the testimony of the witnesses as to how the shooting actually occurred. This raises the question of credibility. It is the function of the trier of fact to resolve conflicts in the evidence, to determine the credibility of the witnesses, and to resolve beyond a reasonable doubt whether the force used was reasonably required. That determination will not be disturbed by a reviewing court unless the evidence is so unreasonable, improbable, or unsatisfactory as to raise a reasonable doubt as to defendant's guilt. (People v. Henry (1980), 86 Ill.App.3d 602, 604, 408 N.E.2d 228, 230.) Where the evidence is merely conflicting, a reviewing court will not substitute its judgment for that of the trier of fact who heard the evidence. People v. Woods (1980), 81 Ill.2d 537, 542, 410 N.E.2d 866, 869.

unreasonably in using his weapon--which could sustain a conviction for a higher degree offense--voluntary manslaughter (unreasonable self-defense under Sec. 9-2) and hence, a conviction for a lesser offense can be sustained.

The Appellate Court's holding is constitutionally impermissible. The conviction of involuntary manslaughter is sustainable only if a trier of fact can find beyond a reasonable doubt the essential element of recklessness. If the court can not find the element of recklessness it cannot substitute a finding that there exists evidence of a more serious offense, i.e., voluntary manslaughter (for which defendant was acquitted). Therefore, the court has failed to satisfy the due process requirements of proof of all essential elements.

Due process was violated because a rational trier of fact could not have found beyond a reasonable doubt the essential element, defendant acted recklessly in shooting deceased.

The testimony of the State's witness, Frank Tavitias, relied upon by the trial court, demonstrates that defendant's conduct was not reckless. The gun was drawn in self-defense after a violent fight had commenced. The gun was fired only after much restraint and only after the deceased "went at" defendant (Tr. 84), pushing defendant with his hands. The gun was fired only after the defendant was himself attacked.

Frank Tavitias testified that he, Warsa and his father, the deceased, (Tr. 166) were sitting at the bar at 12:30 a.m. when Spaulding entered with Schmidt and Eller. (Tr. 169) Spaulding walked past them towards the middle of the bar, (Tr.

173), a violent fight broke out between Schmidt and Eller against Warsa. (Tr. 214-15) As Tavitas was fighting with Eller, he saw the defendant holding the gun pointed in the direction of his father (Tr. 181-82), who was saying, "You don't need a gun." Tavitas then charged toward Spaulding, taking about three steps. In response, defendant Spaulding turned and pointed the gun at Tavitas (Tr. 184); the deceased then "went at him [defendant]" (Tr. 184), making contact with his fingers on defendant's chest. (Tr. 185) Defendant pushed back and the gun went off, just once. (Tr. 185-86)

Under questioning by the court, Tavitas explained the situation again as follows:

Q. And was the gun straight out at your dad?

A. Yes.

Q. Then you started to move, whether you walked or ran?

A. Yes.

Q. Toward him?

A. Yes.

Q. You walked toward him?

A. Yes.

Q. The gun at that point was still on your father?

A. Until I started toward him, yes.

Q. All right. So then in the movement of you, he turned?

A. Yes.

Q. And he pointed the gun at you?

A. Yes.

Q. Then what did your father do?

A. My father went at him.

Q. When you say he went at him, tell me exactly what he did with his hands?

A. He reached out at him with his hand.

Q. You are reaching out with both your hands?

A. Yes.

* * *

The Court: Q. Spaulding pushed your father back?

A. Yes, and fired the gun.

* * *

Q. What part of his body did you see him touch?

A. He touched Spaulding around the chest area, I guess.

Q. And Spaulding had the gun in which hand?

A. His right hand.

Q. Now when your father touched Spaulding, what did he do with his left hand?

A. Shoved him back.

Q. Shoved him back?

A. Yes.

Q. When did the gun go off?

A. After he shoved him back.
(Tr. 235-37)

This testimony conclusively demonstrates that Spaulding drew the gun only after a violent fight had already begun, that he drew the gun for his

protection, that he was acting very cautiously and therefore he was not reckless. He did not immediately fire the gun after pointing it at deceased, he did not fire the gun when he was charged by Tavitas, he did not fire the gun when he was charged by the deceased, he fired the gun only after the deceased "went at him". These facts do not demonstrate reckless conduct. People v. Calhoun, 4 Ill.App.3d 683, 281 N.E.2d 1363.

Considering the violent battle between Tavitas, Eller, Schmidt and Warsa, it was not reckless for the defendant to pull out a weapon to use in self defense. This was a battle that justified defendant's fear that he would be subject to serious bodily harm if he did not protect himself. This was a fight which involved "gouging of eyes, biting, punching, kicking, pulling back mouths a hard fight ... a tavern brawl."

(Tr. 214) It was a fight in which Tavitas feared for his life. (Tr. 215)

Defendant had the right to take the precaution of drawing a weapon, even though those who might attack him might not be armed with a gun. People v. Kelly, 24 Ill.App.3d 1043, 322 N.E.2d 527. The fight occurred in a tavern where there are easily accessible weapons in the form of bottles which have been "classified as a deadly weapon". People v. Villalobos, 53 Ill.App.3d 234, 368 N.E.2d 556. The defendant had to act in haste and was not required to exercise "infallible judgment ... in the space of a few seconds while ... under great stress and excitement ..." People v. Motuzas, 352 Ill. 340, 185 N.E.2d at 617; People v. Bailey, 27 Ill.App.3d 128, 326 N.E.2d 550 (1 Dist. 1976); People v. Harling, 29 Ill.App.2d 1053, 331 N.E.2d 653.

Defendant could have armed himself with a deadly weapon to prevent either serious bodily harm or a forcible felony.⁵ The testimony would indicate that the gun, if drawn by defendant,⁶ was used non-recklessly in self-defense. A finding of recklessness cannot be

5. A battery committed upon the defendant in this tavern, a public way, would be an aggravated battery and therefore a forcible felony. See Chap. 38, Secs. 12-4(8) and 2-8.

6. The State has the burden of proving the shooting was not done in self-defense, even though defendant denied he was responsible for the shooting. In People v. Rorer, 44 Ill.App.3d 553, 358 N.E.2d 681, 3 Ill.Dec. 283, the court rejected the State's assertion that defendant had waived the self-defense issue by not raising it in the trial court, where evidence raised the self-defense issue. In People v. Rodriguez, 96 Ill.App.3d 431, 421 N.E.2d 323, 51 Ill.Dec. 815, the court held even where defendants "did not admit to killing [victim]" 421 N.E.2d at 818, the State had a burden of proof on the self-defense issue, where it is raised by some evidence--"even if the facts on which such defense is based are inconsistent with the defendant's own testimony." 421 N.E.2d at 818. (See People v. Woodward, 77 Ill.App.3d 352, 395 N.E.2d 1203.)

determined merely because defendant had a gun drawn in a situation which is clearly threatening to the defendant and the gun fired. People v. Smith, 16 Ill.App.3d 553, 306 N.E.2d 606. Proof of negligence is insufficient to sustain a conviction of voluntary manslaughter. People v. Chiappa, 53 Ill.App.3d 639, 368 N.E.2d 925.

Due process was violated because defendant was convicted of an offense requiring proof of recklessness and no rational trier of fact could have found defendant acted recklessly. Jackson v. Virginia, supra.

CONCLUSION

It is respectfully requested that certiorari be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
FREDERICK F. COHN
JOYCE A. MATUZAK
Counsel for Petitioner

A P P E N D I C E S

The text of this opinion may be changed
or corrected prior to the time for filing
of a Petition for Rehearing or the
disposition of the same.

FOURTH DIVISION
FILED: 5/19/83.

81-1836

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE)	APPEAL FROM
OF ILLINOIS,)	CIRCUIT COURT,
)	COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
WILLARD SPAULDING,)	HONORABLE
)	ROBERT MASSEY,
Defendant-Appellant.))	PRESIDING.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

After a jury trial, defendant, Willard Spaulding, was found guilty of murder and his conviction was affirmed in People v. Spaulding (1979), 68 Ill. App. 3d 663, 386 N.E.2d 469. A subsequent post-

APPENDIX A

App. 1

conviction petition asserted a conflict of interest because defendant and two co-defendants were represented by the same attorney. The trial court granted an evidentiary hearing which allowed the post-conviction petition. At a subsequent bench trial, Spaulding was acquitted of murder but found guilty of involuntary manslaughter and aggravated battery. For the offense of involuntary manslaughter, he was sentenced to a term of 2 to 6 years, and for the aggravated battery offense he was sentenced to 1 to 2 years, the sentences to run concurrently.

Evidence at trial established that on December 13, 1974 Benito Najera was shot and killed in Woody's Tavern located in Chicago. Prior to the shooting, there had been an altercation involving Richard Schmidt and defendant on one side, and

Benito's nephew, Peter Najera, and James Warsa on the other. According to Warsa, Schmidt held a knife to his (Warsa's) throat, and defendant held a gun to Peter's chin. Schmidt robbed Warsa of several dollars. The altercation spilled out of the tavern onto the street where Schmidt and Warsa continued fighting. During the fight, Peter fired a shotgun blast, supposedly to break up the fight. Peter was taken into custody by the Chicago police after the firing of the shotgun.

Warsa, Frank Tavitas and Benito went to the police station to speak with Peter and to post bail. Warsa, Tavitas and Benito then returned to Woody's Tavern sometime after midnight. Shortly after their arrival, Schmidt, defendant and Cletus Eller entered the tavern. A fight

ensued involving all six men. The State's evidence showed that defendant pointed a gun at Tavitas. Benito, who was unarmed, reached out his hands toward defendant who was still pointing the gun at Tavitas. Defendant then shot Benito once.

Defendant denied having had a gun in his possession on the night in question and he denied having held a gun to Peter's chin during the first altercation. Defendant acknowledged being in the tavern when the second fight broke out, but he denied being involved. According to defendant, immediately after he heard a shot he noticed the gun in Eller's hand.

Cletus Eller also testified for the defense and stated that on the night in question he was in Woody's Tavern and he had a gun under his belt. During the

fight, someone pulled the gun out from under his belt and the gun discharged. His hand was touching the handle but he did not fire the gun. After leaving the tavern, he threw the gun in a sewer.

Two Chicago police officers who testified for the State on rebuttal stated that shortly after the shooting, defendant had told them that Eller was not present when the shooting occurred.

On appeal, defendant alleges that the evidence failed to prove him guilty of involuntary manslaughter and that the evidence is insufficient to sustain his conviction beyond a reasonable doubt.

We reject this argument. The evidence showed that there was a conflict in the testimony of the witnesses as to how the shooting actually occurred. This raises the question of credibility. It is the

function of the trier of fact to resolve conflicts in the evidence, to determine the credibility of the witnesses, and to resolve beyond a reasonable doubt whether the force used was reasonably required. That determination will not be disturbed by a reviewing court unless the evidence is so unreasonable, improbable, or unsatisfactory as to raise a reasonable doubt as to defendant's guilt. (People v. Henry (1980) 86 Ill. App. 3d 602, 604, 408 N.E. 2d 228, 230.) Where the evidence is merely conflicting, a reviewing court will not substitute its judgment for that of the trier of fact who heard the evidence. People v. Woods (1980), 81 Ill. 2d 537, 410 N.E.2d 866, 869.

Defendant next alleges that the trial court erred in refusing to admit into evidence the results of polygraph

examinations. In support of his contention, defendant argues that polygraph tests are 90% accurate. Furthermore, since the cause was tried to the court and not to a jury, the danger of prejudice is considerably less. Defendant cites no case law in support of his position. Our supreme court has held that polygraph evidence is not reliable enough to be admitted. (People v. Baynes (1981), 88 Ill. 2d 225, 244, 430 N.E.2d 1070, 1079.) Therefore, we hold that the trial court did not err in refusing to admit the results of the polygraph examinations.

Finally, defendant alleges the trial court erred when it refused to impose a period of probation or probation with work release and instead imposed a sentence of 2 to 6 years imprisonment.

The trial court heard testimony in mitigation and aggravation prior to sentencing. The trial judge's statement indicates that careful thought was given to the sentences imposed. The trial court is normally the proper forum in which a suitable sentence is to be determined, and the trial judge's decisions in regard to sentencing are entitled to great deference and weight. Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. (People v. Perruquet (1977), 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884.) We hold that the trial court did not abuse its discretion in imposing a sentence of imprisonment rather than probation.

For the above reasons, the judgment of the trial court is affirmed.

DATED AT CHICAGO, ILLINOIS, this 19th
day of May, 1983.

ROMITI, P.J., JOHNSON and JIGANTI, JJ.

58806

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217)782-2035

October 4, 1983

Mr. Julius Lucius Echeles
Attorney at Law
35 E. Wacker Dr., S#3500
Chicago, IL 60601

No. 58806 - People State of Illinois,
respondent, vs. Willard
Spaulding, petitioner.
Leave to appeal, Appellate
Court, First District.

The Supreme Court today DENIED the
petition for leave to appeal in the above
entitled cause.

Very truly yours,

Juleann Hornyak

Clerk of the Supreme Court

P.S. The Mandate of this Court will issue
to the Appellate Court on October
26, 1983.

APPENDIX B

App. 10

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE) APPEAL FROM
OF ILLINOIS,) CIRCUIT COURT,
) COOK COUNTY.
Plaintiff-Appellee,)
)
v.)
)
WILLARD SPAULDING,) HONORABLE
) ROBERT MASSEY,
Defendant-Appellant.) PRESIDING.

O R D E R

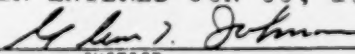
This cause coming on to be heard on
Petition For Rehearing, and the Court now
being fully advised in the premises:

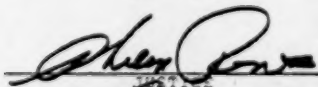
IT IS ORDERED that said Petition For
Rehearing be and the same is hereby denied.

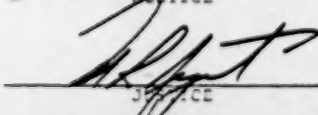
DATED AT CHICAGO, ILLINOIS THIS 30th
day of June, 1983.

ENTER:

ORDER ENTERED JUN 30, 1983


JUSTICE


JUSTICE


JUSTICE

No. 83 - 1005

Office - Supreme Court, U.S.

FILED

FEB 6 1984

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLARD SPAULDING,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate
Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN

Attorney General, State of Illinois
160 North LaSalle Street, Suite 900
Chicago, Illinois 60601
(312) 793-3500

Attorney for Respondent

SALLY LOUISE DILGART *

Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Of Counsel

* Counsel of Record

QUESTION PRESENTED

Whether, after construing all evidence in a manner most favorable to the government, there is sufficient evidence of guilt, particularly of the culpable mental state of recklessness, to support petitioner's judgment of conviction for involuntary manslaughter.

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**On Petition For Writ Of Certiorari To The Appellate
Court Of Illinois, First Judicial District**

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District, is not reported, but a copy of that opinion is included within the appendix to the petition for writ of *certiorari* at App. 1 - App. 9.

JURISDICTION

This Court maintains jurisdiction to review the judgment of the Appellate Court of Illinois, First Judicial District, pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

After jury trial, petitioner was found guilty of murder. He perfected a direct appeal from conviction, but the state appellate court affirmed conviction in an opinion reported at 68 Ill.App.3d 663, 386 N.E.2d 469 (Ct.App. 1979). Leave to appeal was subsequently denied by the Illinois Supreme Court. Writ of *certiorari* was then denied by this Court in *Spaulding v. Illinois*, 444 U.S. 929 (1979). After petitioner later succeeded in obtaining a post-conviction evidentiary hearing to review a new claim in the state trial court, that court vacated judgment of conviction. At his subsequent bench trial, petitioner was acquitted of murder but found guilty of involuntary manslaughter and aggravated battery. Judgment of conviction was affirmed in the Illinois appellate court opinion which petitioner now seeks to review. After petitioner's motion for rehearing was denied, the Illinois Supreme Court declined review.

At petitioner's trial, the government produced evidence that petitioner and Richard Schmidt robbed Peter Najera and James Warsa outside a tavern in Chicago, Illinois on the evening of December 13, 1974. Petitioner held a gun to Najera's chin while Schmidt held a knife at Warsa's throat to accomplish their purpose. Petitioner suggested killing the men, but, after Najera obtained a shotgun and discharged it, police officers arrived and temporarily ended the altercation.

Petitioner and Schmidt returned to the tavern around 1:00 a.m., however. With them was petitioner's brother Cletus Eller. Warsa, Benito Najera (the victim and uncle of Peter Najera), and Frank Tavitass (Benito's son and Peter's cousin) were inside the tavern. Schmidt, testify-

ing for petitioner, admitted at trial that he had delivered a blow to Warsa to which Warsa responded. Eller and Tavitas in turn engaged in a physical altercation initiated by Eller. Petitioner testified at trial that he watched the fight and planned to intervene if and when his brother Eller became tired. Petitioner had confidence in his brother, who was wearing a cast, because, in petitioner's words, "(a) cast makes a good weapon; a person could get hurt from a cast".

Petitioner nevertheless decided to draw a gun and point it at Najera. Najera, with his hands in the air, expressed his belief that a weapon was unnecessary. Tavitas advanced toward petitioner who now aimed the gun at Tavitas. The unarmed Najera then reached toward petitioner and touched petitioner's chest. Petitioner turned, pushed Najera away, and fired the gun at Najera. After Najera fell, petitioner was seen kicking the victim. As Tavitas held his father in his arms, petitioner hit Tavitas with the gun at least a dozen times. After Tavitas fell to the floor under these blows, petitioner kicked him as well. Petitioner then finished his drink and left the tavern. Najera subsequently died as a result of the gunshot wound inflicted by petitioner.

Petitioner and his witnesses gave contradictory accounts. Although brother Cletus Eller had confessed the murder to police officers, petitioner told officers that Eller was not present during the shooting. Petitioner also attempted to persuade officers that he was at home during the robbery portion of the incident. At trial, petitioner testified that Eller had a gun in the tavern. Although Eller had earlier confessed the murder, Eller at trial claimed that the gun accidentally discharged when someone attempted to seize it during the fight. When asked at trial how he obtained possession of the gun, Eller also contradicted his

earlier statements to police officers. Witnesses noted that the right-handed Eller wore a cast covering his right arm and hand that evening, and four occurrence witnesses testified that they saw petitioner with the gun at the time the victim was shot. Police officers were called as State's rebuttal witnesses to prove petitioner's contradictory statements.

Although petitioner at trial completely denied the crime, the defense theory on appeal was that of self-defense. Petitioner now seeks review by this Court through writ of *certiorari*.

REASONS FOR DENYING THE WRIT

I.

THE INSTANT PETITION RAISES NO SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION.

Respondent does not concede that any federal question has been preserved for review in this Court. Because appellant failed to comply with Illinois procedural rule and did not seasonably advance a Fifth and Fourteenth Amendment due process claim in the state appellate court, there is no basis for assertion of this Court's jurisdiction. *Vachon v. New Hampshire*, 414 U.S. 478, 481 (1974) (dissenting opinion); *Beck v. Washington*, 369 U.S. 541, 552-53 (1962). When, as here, the federal constitutional issue was raised for the first time in a petition for rehearing addressed to the intermediate state court, and the state supreme court declined without opinion to hear the case, review by *certiorari* is precluded. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).

Equally important, petitioner's present challenge to the prosecution's proof of reckless conduct is essentially a state law claim. The Illinois legislature has defined the particular mental state in question¹, and the Illinois courts have final authority to interpret that state's legislation. *Adderly v. Florida*, 385 U.S. 39, 46 (1966); *Garner v. Louisiana*, 368 U.S. 157, 166-70 (1961). The Illinois courts have consistently decided that the evidence adduced at petitioner's trial, that the accused had pointed a loaded firearm at another, will support a finding of reckless conduct. See, e.g., *People v. Taylor*, 54 Ill.2d 558, 301 N.E.2d 273 (Sup. Ct. 1973); *People v. Peery*, 19 Ill.App.3d 254, 311 N.E.2d 341 (Ct. App. 1974). Petitioner before this Court argues that the evidence presented at trial did not constitute proof under state law of a reckless state of mind. (Petition at 15, 22). The jurisdiction of this Court does not extend to review of exclusively state law matters, however. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875).

¹ Judgment of conviction was entered for involuntary manslaughter. ILL. REV. STAT. ch. 38, §9-3(a) (1975) provides, in pertinent part, that "[a] person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly". ILL. REV. STAT ch. 38, §4-6 (1961) defines the relevant culpable mental state: "[a] person is reckless, or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation".

II.

THE STATE APPELLATE COURT PROPERLY DECIDED THE ISSUE OF EVIDENTIARY SUFFICIENCY.

In the state courts, appellant unsuccessfully argued that the trial court incorrectly decided two questions of fact, those of recklessness and of self-defense; as a result, appellant contended, the evidence viewed in its entirety did not, as a matter of law, support his conviction for involuntary manslaughter. Indeed, in his petition filed in this Court petitioner reargues his theory of self-defense. (Petition at 22-25).

Petitioner now challenges the reasoning of the state appellate court as well. Respondent entirely disagrees, however, with petitioner's assertion that the state appellate court affirmed petitioner's conviction on the theory that "the defendant could have been found guilty of murder" or voluntary manslaughter. (Petition at 4, 11-13). This conclusion finds no support whatsoever in the record. The trial court specifically found evidence of petitioner's reckless conduct, Tr. 766, and the appellate court, refusing to reassess witness credibility, found sufficient evidence to support judgment of conviction for involuntary manslaughter. *People v. Spaulding*, No. 81-1836, slip op. at 5-6 (Ill. App. Ct. May 19, 1983).

This Court should reject petitioner's invitation to conduct a *de novo* relitigation of factual matters. *Watts v. Indiana*, 338 U.S. 49, 50 (1949). Moreover, respondent respectfully submits that deference to state court determinations of evidentiary sufficiency is now appropriate. *Jackson v. Virginia*, 443 U.S. 307, 323 (1979) (appeal in collateral habeas corpus proceeding); *Hamling v. United States*, 418 U.S. 87, 124 (1974) (direct appeal from federal conviction).

Petitioner cannot impose a duty upon this Court to reweigh the evidence. *Glasser v. United States*, 315 U.S. 60, 80 (1942). Nor should petitioner urge this Court to engage in wholesale reassessments of witness credibility, Petition at 18-22. *United States v. Oregon Medical Society*, 343 U.S. 326, 339 (1952); *Marshall v. Lonberger*, U.S., 103 S.Ct. 843, 851, 74 L.Ed.2d 646, 658 (1983); *Maggio v. Fulford*, U.S., 103 S.Ct. 2261, 2262, 76 L.Ed.2d 794, 800 (1983). Finally, conflicting inferences are now deemed resolved in favor of the prosecution. *Jackson v. Virginia*, 443 U.S. at 326. The general rule of application is that, after reviewing all the evidence in a light most favorable to the prosecution, an appellate court should affirm judgment of conviction if it appears that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319. See also *Burks v. United States*, 437 U.S. 1, 17 (1978) and *Glasser v. United States*, 315 U.S. at 80 (judgment of conviction on direct appeal to be affirmed if there is "substantial" evidence to support the verdict). Contrary to petitioner's assertion in his Petition at 15, a reviewing court does not scrutinize the reasoning process actually used by the factfinder. *Jackson v. Virginia*, 443 U.S. at 320, n. 13. The historical facts recounted within respondent's statement above reveal sufficient evidence to support the judgment of conviction for involuntary manslaughter entered in the state trial court.

III.

THE INSTANT PETITION IDENTIFIES NO ISSUE WORTHY OF PLENARY REVIEW BY THIS COURT.

Petitioner's present claim advances no forensically novel question of federal constitutional law. Petitioner identifies no developing or uncertain area of the law for which this

Court could provide authoritative guidance. Indeed, the parties agree that this case is governed by this Court's prior decision in *Jackson v. Virginia*, 443 U.S. 307 (1979); resolution of the issue within the petition at bar turns on the application of venerable principles announced in the decisional law of this Court.

Equally significant, petitioner's argument addresses only the unique facts within his particular case. The issue framed by petitioner is of interest primarily to the litigants rather than to the general public. As this Court has noted in *Wilkerson v. McCarthy*, 336 U.S. 53, 66-67 (1949) (Frankfurter, J. dissenting) and in *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923), review by writ of *certiorari* is improper in the absence of an issue of immediate public significance.

CONCLUSION

For these reasons, respondent respectfully submits that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

NEIL F. HARTIGAN

Attorney General, State of Illinois
160 North LaSalle Street, Suite 900
Chicago, Illinois 60601
(312) 793-3500

Attorney for Respondent

SALLY LOUISE DILGART *

Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Of Counsel

* Counsel of Record